

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**WAL-MART STORES, INC.**

**Case 21-CA-150416**

**and**

**THE ORGANIZATION UNITED FOR RESPECT  
AT WALMART (OUR WALMART)**

**WAL-MART STORES, INC.’S NOTICE OF SUPPLEMENTAL AUTHORITY RE ITS  
PETITION TO REVOKE OR MODIFY SUBPOENA B-1-OPMCGH**

In its October 22 Petition to Revoke, Walmart asked the Board to revoke Requests 13 and 15 of the Region’s above-referenced Subpoena because the Region violated the Protective Order issued by Judge Geoffrey Carter in Case 16-CA-096240, *et al.* In its October 29 Opposition, the Region argued that it did not violate the Protective Order – in part – because Judge Carter did not place the documents at issue under seal. Opposition at 11. Judge Carter rejected that same argument in a January 15 Order granting Walmart’s Motion to Enforce Protective Order against the Charging Party (UFCW). [See January 15, 2016 Order Granting Motion to Enforce Protective Order, Tab A at 2.] Walmart files this Notice of Supplemental Authority to advise the Board of that newly issued Order.

In his January 15 Order, Judge Carter addressed an identical argument by the UFCW after it turned over confidential documents to a reporter, who then published information from those confidential documents. As here, the UFCW claimed that the Protective Order did not apply because the documents were not under seal. Judge Carter rejected that idea. He explained that the Protective Order, “states explicitly that throughout and after the final disposition of this case, any documents marked or designated as confidential ‘shall be disclosed only to the [ALJ]

and the court reporter, the CGC, UFCW/[OURWalmart], and their staff, and witnesses who are testifying under oath...about Confidential Information.” [Id.] The Judge concluded that “even though Walmart did not place the confidential documents under seal, the Charging Party was nonetheless bound to comply with the (non)disclosure terms of the protective order that it agreed to.” [Id. at 3.] The CGC likewise here remains bound to the terms of the Protective Order to which he agreed, specifically the term that expressly limits the use of confidential documents to the cases before Judge Carter.

DATED this 20th day of January, 2016.

By s/ Steven D. Wheelless  
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Attorneys for Wal-Mart Stores, Inc.

ORIGINAL of the foregoing efiled  
with the National Labor  
Relations Board this 20th day of  
January, 2016, to:

Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1099 14th Street N.W.  
Washington D.C. 20570

COPY of the foregoing e-mailed this  
20th day of January, 2016, to:

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/s/ Elizabeth Alvarado

**TAB A**

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**WALMART STORES, INC.**

**and**

<b>Cases</b>	
	<b>16-CA-096240</b>
	<b>16-CA-105873</b>
	<b>16-CA-108394</b>
	<b>16-CA-113087</b>
	<b>16-CA-122578</b>
	<b>16-CA-124099</b>
	<b>21-CA-105401</b>
	<b>26-CA-093558</b>
	<b>13-CA-107343</b>

**THE ORGANIZATION UNITED FOR  
RESPECT AT WALMART (OUR  
WALMART)**

**ORDER GRANTING DECEMBER 9, 2015 MOTION TO ENFORCE  
PROTECTIVE ORDER**

*Background*

On December 9, 2015, Walmart Stores, Inc. (Walmart) filed a motion to enforce the protective order in the case captioned above. In support of its motion, Walmart asserted that OUR Walmart and the UFCW (collectively, Charging Party) violated the protective order in this case by disclosing at least two confidential documents (Charging Party Exhibit 10 and General Counsel Exhibit 102) to a *Bloomberg Businessweek* journalist.

On December 23, 2015, the Charging Party filed its response to Walmart's December 9 motion.<sup>1</sup> The Charging Party did not deny Walmart's allegation that the Charging Party disclosed the two in question to a journalist, but asserted that (a) the documents were not in fact confidential; and (b) the documents are no longer subject to the protective order because they were admitted into the public record at an NLRB hearing and were not placed under seal.

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<sup>1</sup> The General Counsel also filed a response to Walmart's motion, but did not take a position on Walmart's assertion that the Charging Party disclosed confidential documents in violation of the protective order.

### Analysis

At the beginning of trial, the parties worked collectively to negotiate the terms of the protective order that I issued in this case. Each of the parties, including the Charging Party, agreed to the terms of the protective order. (See Transcript (Tr.) at 12-13; General Counsel Exhibit (Exh.) 1(ii).) I am inclined to hold the Charging Party to its agreement, barring some extenuating circumstances that may dictate otherwise.

Having reviewed the Charging Party's response to Walmart's motion to enforce the protective order, I do not see a basis to excuse the Charging Party from complying with the terms of the protective order that it agreed to. The Charging Party's argument that Charging Party Exhibit 10 and General Counsel Exhibit 102 are not in fact confidential is without merit. Both of those documents are marked as confidential, and to the extent that the Charging Party believed that the confidential labels were not warranted, the Charging Party should have raised that issue during trial (as called for in paragraph 5 of the protective order) when it or another party offered the exhibit into evidence. The Charging Party did not do so (see Tr. 5225-5226 (discussing General Counsel Exh. 102); Tr. 5284-5285 (discussing Charging Party Exh. 10)), and thus waived any objections that it might have raised about whether the exhibits were properly marked as confidential.

I also find that the Charging Party fails with its argument that the documents were no longer subject to the protective order once they were admitted into the record at trial (and not placed under seal). The protective order that the Charging Party agreed to does not contain such an exception, and to the contrary, states explicitly that throughout and after the final disposition of this case, any documents marked or designated as confidential "shall be disclosed only to the [ALJ] and the court reporter, the CGC, UFCW/[Our Walmart], and their staff, and witnesses who are testifying under oath . . . about Confidential Information." Based on the protective order, and in the absence of any contemporaneous objection by the Charging Party to the protective order applying to Charging Party Exhibit 10 and General Counsel Exhibit 102, Walmart reasonably expected that confidential documents would retain that status even if admitted into the evidentiary record during trial.<sup>2</sup> Compare *United Parcel Service*, 304 NLRB 693, 694 (1991) (finding that since the ALJ did not adequately extend the protective order beyond the date of his decision on the merits of the case, an attorney did not violate the protective order when he obtained a copy of a confidential document after the ALJ issued his decision and the case file was transferred to the Board's records unit).

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<sup>2</sup> The cases that the Charging Party cited do not undermine my conclusion. (See Charging Party Response to Motion at 4-7 (discussing *Poliquin v. Garden Way, Inc.*, 989 F.2d 527 (1<sup>st</sup> Cir. 1993) and *Littlejohn v. Bic Corp.*, 851 F.2d 673 (1988)). Neither *Poliquin* nor *Littlejohn* involved a protective order with language that is comparable to the one in this case, much less an agreement to the protective order language that is comparable to the Charging Party's agreement here. See *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 529 (1<sup>st</sup> Cir. 1993) (noting that the plaintiff, who was seeking to disclose materials that the defendant deemed confidential, objected to the terms of the protective order that the court issued); *Littlejohn v. Bic Corp.*, 851 F.2d 673, 676 (1988) (discussing a protective order that did not address whether confidential documents admitted into evidence at trial would remain confidential).

In sum, even though Walmart did not place the confidential documents under seal, the Charging Party was nonetheless bound to comply with the (non)disclosure terms of the protective order that it agreed to. The Charging Party violated the explicit terms protective order when it disclosed Charging Party Exhibit 10 and General Counsel Exhibit 102 to a journalist despite the fact that Walmart designated those two exhibits as confidential.


*Remedy*

In light of the violations of the protective order that I have found herein, I hereby direct the Charging Party to do the following:

1. Comply with the terms of the protective order in this case, including the terms of the protective order that identify the individuals and entities to whom documents that have been designated or marked as confidential documents may be disclosed; and
2. Prepare and file a document, **on or before January 22, 2016** (with courtesy copies provided to me and counsel for all parties) that: (a) lists each entity or individual to which the Charging Party has disclosed documents that are designated or marked as confidential documents in this case (including *Bloomberg Businessweek*, and excluding entities or individuals to whom disclosure is permitted under the terms of the protective order); and (b) for each such entity or individual listed in section (a), identifies (by exhibit number if available, or alternatively by document title and Bates number) the confidential documents that were disclosed.

IT IS SO ORDERED.<sup>3</sup>

Dated: January 15, 2016  
Washington, D.C.



Geoffrey Carter  
Administrative Law Judge

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<sup>3</sup> The parties should consult my final decision in this case to ascertain whether I set forth additional instructions or guidelines regarding how documents covered by the protective orders in this case shall be handled.